No. 211

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS AND F. WALSH,
Petitioners,

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
AND
MARVIN JONES, WAR FOOD ADMINISTRATOR OF THE UNITED STATES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONERS, DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, C. STEBBINS and F. WALSH.

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INDEX.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 66) is reported in 136 F. (2d) 786. This opinion affirms the decision of the United States District Court for the District of Columbia, per Adkins, District Judge, which is unreported (R. 24), dismissing the complaint.

Jurisdiction

The judgment of the court below was entered on June 14, 1943 (R. 73). The petition for a writ of certiorari was filed on July 29, 1943, and was granted on October 11, 1943. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. Sec. 347).

Statute and Order Involved

The Statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 USC Sec. 601 *et seq.*) which re-enacts and amends some of the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended by Act of August 24, 1935 (49 Stat. 750). It is set out in Appendix A, *infra.*

The order involved is Order No. 4, as amended by the order of the Secretary of Agriculture, dated July 28, 1941, effective August 1, 1941 (7 C.F.R. Chap. IX, Sec. 904; 6 Fed. Reg. 3762). A compilation of the Order incorporating the amendments is printed (R. pp. 51-65).

Question Presented

Whether milk producers have standing to maintain an action to enjoin the Secretary of Agriculture and War Food Administrator from qualifying or certifying cooperative associations for cer-

tain payments out of the equalization pool established by the Order which are not authorized by the Statute, and which are accomplished by a deduction in computing the uniform or blended price which the producers receive for their milk.

STATEMENT

I. Proceedings Below

On September 22, 1941 the petitioners filed their complaint in the United States District Court for the District Court of Columbia. The allegations of the complaint (R. p. 6) may be summarized as follows:

The plaintiffs are milk producers, citizens of the States of New York, Maine, New Hampshire and Vermont, who sell milk to "handlers" subject to Order No. 4 as amended regulating the handling of milk in the Greater Boston Marketing Area. They are not members of any cooperative association. (Paragraphs 1, 3, 5 of Complaint, R. p. 6, 7). Effective August 1, 1941, certain provisions of an amendment to Order No. 4 regulating the handling of milk in the Greater Boston Marketing Area, Sections 904.7(b)5 and 904.9(a)-(d)) provided that a deduction (of 1-½ or 5 cents per cwt. of milk) be made from the equalization pool and in computing the blended price, and further provided that the funds thus subtracted should be paid by the Market Administrator to any cooperative association engaged in certain marketing activities and

which the Secretary of Agriculture certified as qualified within certain requirements set forth in Sec. 904.9 of the Order. (Paragraph 5 of Complaint, R. p. 7). These provisions of the Order were issued by the Secretary of Agriculture without statutory authority and are null and void. (Paragraph 13 of Complaint, R. p. 10). They reduced the blended price for August, 1941 by 1.55 cents per cwt. (Paragraph 12 of Complaint, R. p. 10). By virtue of the deduction from the Producer Settlement Fund for these payments, the Secretary has caused the petitioners to be paid a price for their milk below the minimum to which they are entitled under the Act (Paragraph 7 of Complaint, R. p. 8.) The illegal deductions for the payments to cooperative associations would deprive the plaintiffs and milk producers similarly situated of more than $60,000 per year (Paragraph 15 of Complaint, R. p. 11).

On their own behalf and on behalf of others similarly situated, the petitioners sought an injunction to restrain the Secretary of Agriculture from qualifying or certifying the qualification of any cooperative association for the payments under the illegal and unauthorized provisions of the Order. In the event that he had so qualified or certified cooperative associations, the petitioners prayed that he be required to withdraw or cancel such qualification or certification (R. p. 12). The petitioners further sought a judgment declaring the provisions

in question, Sec. 904.9 (a)-(d) and Sec. 904.7 (b) (5) of the Order as amended, to be unauthorized, illegal and void (R. p. 12).

In the District Court the defendant moved for summary judgment under Rule 56 (F.R.C.P.), which motion was denied by Daniel W. O'Donoghue, J., who directed an answer on the merits (R. p. 5). The answer included as the first defense that the complaint failed to state a cause of action against the defendant upon which relief could be granted (R. p. 20). The petitioners filed a motion to dismiss the first defense (R. p. 24). The case came on to be heard in the District Court upon this motion, "all parties having agreed to consider the motion as a preliminary hearing on the first defense contained in the answer" (R. p. 24). After argument on the first defense judgment was entered by Jesse C. Adkins, J. sustaining the first defense and dismissing the complaint (R. p. 24). The trial judge, relying upon the decision of the Court of Appeals for the District of Columbia in *Wallace* v. *Ganley*, 68 App. D.C. 235, 95 F.(2d) 364, decided that the petitioners were without standing to challenge the validity of the Order (R. p. 27). An appeal followed to the United States Court of Appeals for the District of Columbia (R. p. 25). That Court considered the only question before it to be whether the petitioners "have standing to seek review of the Secretary's Order" (R. p. 69). In an opinion set forth on pages 66-73 of the

Record it concluded that they did not. Neither Court dealt with the merits of the contention that the contested provisions of the Order are unauthorized by statute, illegal and void. In effect they decided that the petitioners had no standing to complain even if the provisions were, as alleged, illegal, void, and without statutory authority. The correctness of this decision is the only issue before this Court. Upon motion by the petitioners, Marvin Jones, War Food Administrator, was joined as party respondent in this Court on November 8, 1943 since, by Executive Order, he is vested with coordinate powers with the Secretary of Agriculture.

II. The Statute Involved.

The permissible terms in an order regulating the handling of milk are set forth in Secs. 8c(5) and 8c(7) of the Agricultural Marketing Agreement Act of 1937 (R. pp. 34, 35, 37 and Appendix A). Such an order must contain one or more of the terms listed in those sections, and no others.

The first term (Sec. 8c(5)(A)) is one classifying milk in accordance with its use and fixing prices, uniform as to all handlers, payable to producers for each classification. Under such a term, the price each farmer received for his milk would be governed by the use to which it was put by the handler (*i.e.*, dealer) who bought it. For example, the farmer whose milk was sold for consumption as

fluid milk would be paid one price and the farmer whose milk was sold as butter would be paid another.

The second term (Sec. 8c(5)(B)(i)) provides that a handler shall pay a uniform price to all producers or associations of producers selling milk to him. Since under an order embodying the first term, the handler would be obligated to pay for his milk at the use class prices, and since he commingles the milk of various producers delivering to him, it is impossible for him to tell the use to which milk purchased from any particular producer is put. Under the second permissible term, therefore, he is required to determine his total financial obligation at the class prices and to divide that figure by the total number of units of milk he has bought. The result is a composite price which he must pay to each producer for each unit of milk delivered to him. The Secretary may not insert this term in an order unless three-fourths of all the producers agree.

The third permissible term (Sec. 8c(5)(B)(ii)) is an alternative to the second. It provides for payment to all producers and associations of producers in the market of uniform prices irrespective of the uses made of their milk by the individual handler to whom they deliver it. The uniform price is subject only to certain specific statutory adjustments. (Sec. 8c(5)(B)(ii)). These adjustments are for customary volume, market and production

differentials, for grade and quality of milk, for locations at which delivery is made. A further adjustment is provided "equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time".

Standing alone, Sec. 8c(5)(B)(ii) would simply impose upon all handlers the obligation to pay a uniform flat price for all milk delivered to them. If, however, it is used in an order embodying the first permissible term, *i.e.*, the requirements that each handler pay on the basis of his own use of milk, there would be an apparent inconsistency. Handlers would pay on one basis, producers receive on another. The group of dealers whose milk had a use value higher than the amount they would be required to pay at the uniform prices would pay less than the use value of their milk. Others, whose milk had a lower use value would be required to pay more. The fourth term (Sec. 8c(5)(C)), which the Secretary may include, fills the gap by compelling the first group to reimburse the second for the difference between the amounts it had paid to its producers and the full use value of its milk. In the end, therefore, producers would receive uniform prices and each handler would pay out the use value of his milk.

The fifth permissible term (Sec. 8c(5)(D)) authorized the Secretary to require payments to ne

producers entering the market to be made at the lowest class price.

The sixth term (Sec. 8c(5)(E)) deals with a new subject. An order may provide for market information to producers and for sundry other services, except as to producers for whom such services are being rendered by a qualified cooperative marketing association.

The other terms which may be included in milk orders are then described by the Act. The Secretary may include any term prohibiting unfair methods of competition or unfair trade practices (Sec. 8c(7)(A)). He may designate an agency to administer his order (Sec. 8c(7)(C)). Finally, he may include any term incidental to and not inconsistent with the specified terms and necessary to effectuate the other provisions of the Order (Sec. 8c(7)(D)).

The Secretary is forbidden to include any term not listed in the Act (Sec. 8c(5)). Neither may he provide marketing services for members of cooperative associations (Sec. 8c(5)(E)), nor may such an association be prevented from treating the proceeds of its sales in accordance with its contract with its members (Sec. 8c(5)(F)). Furthermore, there may be no regulation of the handling of milk in an area which would limit the marketing in that area of milk products produced elsewhere in the United States (Sec. 8c(5)(G)). Other prohibitions are listed in Secs. 8c(10), (11) and (13).

Having spelled out the prerequisites and contents of milk orders, Sec. 8c of the Act then goes on to deal with the questions which would subsequently arise. Provision is made for the punishment of violations of any order (Sec. 8c(14)) and for administrative review (Sec. 8c(15)). Any handler subject to an order may file a written petition with the Secretary of Agriculture stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom (Sec. 8c(15)(A)). A handler is afforded judicial review of the ruling of the Secretary of Agriculture upon its petition (Sec. 8c (15)(B)). Then, Sec. 8c(16) directs the Secretary to terminate or suspend an order or any provision of an order if he finds that it does not tend to effectuate the policy of the Act or if he finds that more than half the producers are dissatisfied with the order.

Up to this point the Act defines the powers of the Secretary and the limitations thereon in terms of original orders. Sec. 8c(17), however, covers the possibility of amendments by providing that the provisions of Secs. 8c, 8d and 8e applicable to orders shall be applicable to amendments to orders.

III. The Order Involved.

The provisions of the amended Order (R. p. 51-65) set up a comprehensive system of regulation in

the charge of a Market Administrator. Sec. 904.1 defines the Greater Boston cities and towns which are to be the marketing area regulated, defines a handler as any one who engages in the handling of milk which is in the current of interstate commerce or directly burdens or obstructs such commerce and defines a producer as any one who produces milk in conformity with the health regulations applicable to the sale of fluid milk in the marketing area. Sec. 904.2 establishes the office of Market Administrator and prescribes the duties of its incumbent. Then follow the provisions which he is to administer.

Sec. 904.3 classifies milk in accordance with its use by the handler. Roughly, Class I milk is milk sold as whole or flavored milk, and Class II milk is milk sold for any other purpose. This provision for use classification is in accordance with Sec. 8c(5)(A) of the Act.

Sec. 904.4 then provides for so-called "minimum prices" for each class of milk. The price for Class I milk is fixed and a formula is established for fixing the Class II price. These minimum prices "each handler shall pay producers in the manner set forth in Section 904.8". Sec. 904.5 requires reports from handlers of their use of milk for the purpose of classification.

Sec. 904.7(a) requires the Administrator to compute for each delivery period the value of milk sold, distributed or used by each handler. This is

done by multiplying the amount of milk sold by a handler as Class I milk by the Class I price and the amount sold as Class II by the Class II price, and adding together the resulting value of each class. The uniform price to producers is then computed under the terms of Sec. 904.7(b). Here the Order adopts the principle of a market-wide equalization pool, authorized by Secs. 8c(5)(B)(ii) and 8c(5)(C) of the Act. The Market Administrator computes a composite blended price based on the value of all the milk sold by all handlers in the market. It is in the prescribed computation of this price that there occurs the deduction, not authorized by statute, of which the petitioners complain. Sec. 904.7(b)(5) provides that in the computation of the blended price to producers the Market Administrator shall "subtract the total of payments required to be made for such delivery period pursuant to Sec. 904.9(b)". These payments are those made to so-called qualified cooperative associations.

Sec. 904.8 then provides for payments by handlers for milk. There are prescribed advance payments, final payments, adjustments of errors in payment and various differentials. It is the final payments with which we are here concerned, and these are of three kinds: (1) payments of the blended price computed pursuant to Sec. 904.7(b) to all except new producers, (2) payments of the Class II price to new producers, and (3) payments

"To producers through the market administra-

> *tor* by paying to . . . or receiving from the market administrator . . . , as the case may be, the amount by which the payments required to be made pursuant to subparagraphs (1) and (2) of this paragraph [the preceding two types of payment] are less than or exceed the value of milk as required to be computed for such handler pursuant to Sec. 904.7(a) [the total class value of milk disposed of by each handler]." (Bracketed material and emphasis supplied.)

The language quoted is the heart of the market-wide equalization scheme and sets up the equalization pool. Under Sec. 904.8 each handler is required to pay each regular producer from whom he buys milk the blended price per hundredweight for the quantity of milk delivered by such producer. If the total amount he owes his producers is less than the "value" of his milk at the classified prices, such handler must then pay the difference "To producers, through the market administrator". This difference is the so-called equalization payment. The fund into which this payment is made has been aptly described by this Court as "the producer settlement fund". *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533. It is from this fund that the cooperatives receive the payments prescribed in Sec. 904.9, which the petitioners claim are not authorized and are forbidden by the Act.

Sec. 904.9 of the Order then prescribes the sums

to be paid to cooperative associations and the conditions these associations must meet to be eligible for them. In brief, a cooperative association which markets the milk of its members is entitled to an amount computed at not more than the rate of 1-½ cents per hundred-weight of milk marketed by it on behalf of its members. A cooperative association which receives milk from producers at a plant operated under the exclusive control of member producers is entitled to an amount computed at the rate of 5 cents per hundredweight on Class I milk received from producers at such a plant.

The petitioners challenged no provisions of the Order other than those providing for these payments to cooperatives out of the equalization pool, through the mechanism of the deduction from the blended price.

The practical operation of the payment to cooperatives as it affects the blended price to producers is shown by the Market Administrator's announcement of the blended price, Exhibit B to the bill of complaint (R. pp. 15-20). However, the operation may perhaps be more clearly explained by the following simplified illustration.

Assume that there are only two handlers, A and B, in the market and that the prices fixed by Sec. 904.4 of the Order are $3.00 for Class I and $1.50 for Class II milk. If handler A purchased 150,000 cwt. of milk and sold 100,000 cwt. as fluid or Class I milk, and 50,000 cwt. as manufactured or Class II

milk, the Administrator, in accordance with Sec. 904.7(a) of the Order, would compute the value of A's milk from A's reports made under Sec. 904.5 as follows:

Class I	100,000 cwt. x $3.00 =	$300,000
Class II	50,000 cwt. x $1.50 =	75,000
		$375,000

If handler B purchased 150,000 cwt. and sold 50,000 cwt. as Class I and 100,000 cwt. as Class II, a similar computation would be made to determine the value of his milk:

Class I	50,000 cwt. x $3.00 =	$150,000
Class II	100,000 cwt. x $1.50 =	150,000
Total value for handler B		$300,000

Under Sec. 904.7(b) the Market Administrator then computes the "blended price" as follows: The total value of the milk in the market is computed by combining into one total the value of the milk for each handler (Sec. 904.7(b)(1))

Handler A	$375,000
Handler B	300,000
	$675,000

Then this sum is divided by the total number of hundredweight purchased by A and B, in order to obtain the "blended" price (Sec. 904.7(b)(6))

$675,000 ÷ 300,000 cwt. = $2.25

(Calculations involving location and other differentials are omitted. The deduction for cooperative payments is later described).

Under Sec. 904.8(b)(1) both A and B must pay their respective producers the blended price per hundredweight. A will pay 150,000 cwt. x $2.25 = $337,500 and B will pay 150,000 cwt. x $2.25 = $337,500. It will be noticed that A's payments to his producers will be less than the value assigned to his milk, whereas B's will exceed that value.

	Handler A	*Handler B*
Total Value	$375,000	$300,000
Producer Payments	337,500	337,500
	$37,500	— $37,500

By virtue of Sec. 904-8(b)(3), handler A is required to pay "producers through the market administrator" the sum of $37,500. Handler B is entitled to receive $37,500 from the Market Administrator since that represents the excess of the blended price to his producers over the use value of his milk.

The operation of those provisions of the Order granting to cooperatives payments from the equalization pool may now be described, assuming the same facts as in the foregoing example.

The Market Administrator, in computing the blended price, is required to subtract the total payments required to be made to cooperative associa-

tions (Sec. 904.7(b)(5)) from the value of the milk received by handlers, before he divides that value by the quantity of milk included in his computations.

Assuming that cooperative payments are determined pursuant to Sec. 904.9 of the Order to be $15,000, the Market Administrator, pursuant to Sec. 904.7(b)(5), subtracts this sum from $675,000, the total value of the milk of handlers A and B. (See Market Administrator's Announcement, Exhibit B to the Complaint, R. p. 19). Then the resulting sum of $660,000 is divided by the total number of hundred-weight purchased by A and B to determine the blended price:

$$\$660,000 \div 300,000 \text{ cwt.} = \$2.20$$

The blended price is now reduced from $2.25 to $2.20.

Handlers A and B will each pay producers 150,000 cwt. x $2.20 = $330,000. It will again be observed that A's payments to producers will be less than the value assigned to his milk, whereas B's will exceed that value.

	Handler A	*Handler B*
Total Value	$375,000	$300,000
Producer Payments	330,000	330,000
	$45,000	— $30,000

Handler A is still required, under Sec. 904.8(b)(3) to pay "to producers through the market adminis-

trator" $45,000, the difference between the use value of his milk and his payments to producers at the blended price. And handler B, having paid his producers the reduced blended price, is entitled to receive $30,000 from the Market Administrator. A's payment into the equalization pool no longer balances B's withdrawal. There is a difference of $15,000 and this sum, received by the Market Administrator, is paid out to the cooperative associations under Sec. 904.9(b).

The payments to cooperative associations are made from funds received by the Market Administrator from handlers, as "payments to producers" (Sec. 904.8(b)). The reduction in the blended price by the subtraction of these payments to cooperatives in its computation (Sec. 904.7 (b) (5)) places the Market Administrator in funds to make the payments.

SUMMARY OF ARGUMENT

The governing criteria of the petitioners' standing to sue have been set forth by this Court in *Tennessee Power Company* v. *T. V. A.*, 306 U. S. 118, 137-138. The petitioners must invoke the protection of "a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege". The statutory scheme of regulation in the present case is modern and unique. Hence, to specify that the right of the petitioners fits *exclu-*

sively or *predominantly* in some one or more of the categories described by the Court is to undertake classification so refined that it may obscure matters of substance. The ultimate test of the existence of the petitioners' right "is not to be found in an over-refined technique". *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407, 425. The substantive right involved here springs from a definite property interest in the producer settlement fund. In another aspect, the right arises out of contract, since it grows out of a purchase and sale of milk. Because the fund involved is of statutory origin and the price of the product is fixed by statute, the right involved may be viewed as founded on a statute which confers a privilege.

At the outset, it is submitted the petitioners and producers similarly situated are directly affected in a pecuniary way by the challenged provisions of the Order. The challenged payments to cooperatives are made from producers' money, through a reduction in the price for their milk. The analysis we have made of the source of the payments to cooperative associations required by Sec. 904.9 of the Order indicates that they are correctly described by the Secretary as "payments out of the equalization pool" (Sec. 904.0 Finding No. 3). The blended price payable to producers is reduced by the amount necessary to make these payments. The funds from which they are paid come into the Market Administrator's hands as "payments to pro-

ducers" from handlers, in the operation of the equalization system permitted by the Act, designed to give producers uniform prices irrespective of the uses made of their milk by the handler receiving it.

If all handlers in the market paid directly to the Market Administrator the use value of their milk, and he then distributed that use value to producers through uniform prices, retaining money for the cooperative payments before he did so, it would be apparent that the cooperatives were getting subsidies out of the money fixed by statutory mandate as the value of the producers' milk. For administrative convenience the Order accomplishes the same result through inter-handler adjustments. But the more complex nature of the regulatory scheme cannot disguise the fact that the cooperatives are being paid from sums of money fixed under the statute as the price of milk delivered by producers. Indeed, if in the administration of Order No. 4, the handlers subject thereto happened to have the same milk utilization in a given delivery period, none of them would make any substantial payment to the Market Administrator under Sec. 904.8(b)(3) except the sums he needed to disburse to the cooperatives, and those payments would be deductions directly made by each handler from the uniform price payable to his producers.

The Act permits fixing classified prices for milk received by handlers. It permits the producers in the market to share equally in the market-wide

value of milk at the classified price, through receipt of the uniform price. In the present case the Secretary of Agriculture intervenes before the producers receive the uniform price and without any statutory authority appropriates a portion of the value of their milk at the classified prices and directs its payments to cooperative associations. The pecuniary injury to producers is direct and plain. The Government conceded in its brief in the Court below (p. 8) "that only producers are *affected* by any payments out of the equalization fund".

The only question in the present case is whether some technical doctrine with respect to standing to sue or implied statutory prohibition against suit makes the injury of the producers "*damnum absque injuria*". To deny that the producers are injured on the theory that they are still at liberty to bargain with handlers for more money begs the question. It is unnecessary to labor the economic unreality of this chance. It is a novel doctrine to assert that a man loses the right to demand that to which he is legally entitled because he could bargain for more than that to which he is legally entitled. Because he could demand more than the law allows, does he thereby waive his right to that which the law allows? The chance, economically unreal and illusory although it is, that producers might bargain for more than the legally computed blended price hardly affects their right to receive

the legally computed blended price. If producers have no standing to challenge illegal deductions from the statutory uniform price for their product, then the Agricultural Marketing Agreement Act of 1937 ceases to be a statute permitting price regulation of milk and other products. It is transformed into a statute permitting exactions from milk dealers in the guise of prices to producers, which exactions are then subject to dispersion according to unregulated administrative caprice. But the Act and the valid provisions of the Order, as construed by this Court, indicate on the contrary that the producers have a substantive interest in the fund which their product creates.

For convenient analysis we have divided the argument as follows:

Producers have an equitable interest in the producer settlement fund which gives them standing to protect what rightfully belongs to them. Handlers have no financial interest therein, (*United States* v. *Rock Royal Co-operative, Inc.*) and the Government has no beneficial interest since the market administrator is a mere custodian of funds due producers. Private persons may protect their property in the hands of a government custodian from illegal dissipation.

Producers have standing to sue to prevent illegal interference with the contractual relations which arise from the sale of their milk to handlers. These rights are distinguishable from those asserted in

Wallace v. *Ganley* where no actual or threatened breach of contract was involved.

Because the Act gives producers the right to receive the prices for milk which the handlers must pay under the Order, the respondents are unlawfully denying to petitioners this statutory privilege by dissipating part of these monies. Consequently petitioners' loss is not *damnum absque injuria* and cases under statutes enacted in the proprietary capacity of the Government are inapplicable. In effect respondents prevent producers from receiving a uniform price as required by the Act.

Finally we point out that nothing in the Statute denies petitioners standing to complain and that their loss is not speculative or indeterminate.

ARGUMENT

I. The Petitioners Have an Equitable Interest in the Producer Settlment Fund Which Gives Them Standing to Sue.

The sums of money which come into the producer settlement fund are correctly described in the Order itself as payments "To producers through the market administrator". They represent the value of producers' milk at the classified prices. Handlers have no interest in the fund. The Market Administrator has no equitable ownership in the fund. Neither does the Secretary of Agriculture nor the Government of the United States.

A. Handlers have no interest in the producer settlement fund.

In *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, handlers sought a determination of the specific issue which producers try to raise here, the validity of payments to cooperative associations and of deductions therefor in computing the blended price. The Government insisted that they had no standing to raise the point. The brief for the United States in that case discusses the relation of producers and handlers to the producer settlement fund at several points as follows:

> "The effect of Order No. 27 is to create a market-wide pool of milk so that each handler, in effect, purchases his milk at the class prices from a *pool created by all producers* supplying milk to the market and not from the individual producers who deliver the milk to him" (pp. 27-28 of Brief). (Emphasis supplied.)
>
> "It should be emphasized that the money involved in the payments to the Producer Settlement Fund is not money belonging to the handlers, because all handlers pay the same class prices for milk used, but is money which represents a part of the value of the milk delivered by producers" (p. 28 of Brief).
>
> "The money involved in these payments represents a part of the value of the milk delivered by producers; it is money which should

be distributed among the producers, and it is this distribution which is accomplished by the equalization payments. The handlers as such have no right to any part of it at any time. When it is paid they are deprived of nothing. They have merely served as a conduit for its distribution among producers" (p. 125 of Brief).

At one point the Government Brief discusses market service or diversion payments, and the following statement is made:

> "Like the cooperative payments they are paid out of monies due to producers" (p. 157).

This Court held that handlers had no standing to object to the terms of the Order providing for the payments to cooperative associations. The Court said (page 561):

> "None of the defendants (all handlers), on the other hand, is in a position to raise the issue of lack of statutory authority for the payments authorized by Article VII, §§ 5 and 6. Whether cooperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants' profit or loss depends upon the spread each receives between the class price and sale price. If the

deductions from the fund are small or nothing, the patron receives a higher price but the handler is not affected."

B. The Government has no beneficial interest in the producer settlement fund.

It may be suggested that payments to cooperatives are made in the public interest, that the government on behalf of the public generally has the actual beneficial interest in the producer settlement fund. Such an argument overlooks the origin of the fund strongly indicated in its very name. Handlers make payments into the fund because they owe more for their milk under the Order than they have paid. They do not owe it to the government. It is an obligation to producers. In this regard the description by the Court of the pool under the Bankhead Cotton Control Act, in *Thomson* v. *Deal*, 92 F(2d) 478, 482 is precisely applicable: "the money is entirely a private fund as to which the Treasurer is a mere custodian for private interests and the United States as such are strangers. It is not public money nor money subject to the appropriation of Congress, . . ."

It is obvious, of course, that the Market Administrator through whom payments are made to producers has no beneficial interest in the money thus coming through his hands. The Secretary of Agriculture has no interest or contact with the fund whatever, apart from his attempt, through the con-

tested term in the order, to divert part of it to co-operative associations.

There is nothing in *Dayton-Goose Creek Ry.* v. *United States,* 263 U.S. 456, 484, to indicate that the producer settlement fund is a unique statutory creation, to be devoted to public purposes, the use of which cannot be questioned by private individuals. It may be possible to have such a fund, but the *Dayton-Goose Creek* case is certainly not authority that the producer settlement fund is in that category. In that case part of freight charges in excess of a fair return to the carrier became the property of the government to create a fund for helping weaker roads. A carrier's objections were met by the following language (p. 484):

> "It is then objected that the government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid."

The Court went on to point out (p. 484) that "The excess caused by the *discrepancy* between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for

public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier." (Emphasis supplied.)

In the present case the Statute permits no discrepancy between the price handlers pay and the prices producers receive, which the government may appropriate for public uses. The Act requires the handlers to pay the minimum class prices for milk, and the producers have the right to receive the market-wide value of milk at those classified prices through receipt of the uniform prices. The government has no interest under the Act entitling it to draw off part of the producer settlement fund for its own or other public purposes. Certainly the Statute did not give the Secretary of Agriculture the right thus to divert part of this fund to what he conceived to be a proper purpose.

To hold that the producer settlement fund is a fund to be devoted by the Secretary of Agriculture to some vague and undefined public purpose which cannot be challenged in Court by the contributors thereto or by any other person leads to conclusions that demonstrate the unsoundness of the premise. It could be utilized to build post offices, roads, hospitals. The diversion could be large or small. It could swallow up the whole fund to the complete frustration of its purpose to return uniform prices to producers. And if no one had standing to challenge its diversion, the fund could be dissipated in bounties to private persons. This is the very thing

the petitioners allege is taking place here and with regard to which they have standing to complain.

C. Proper analysis of the order and of the nature of the producer settlement fund shows that producers are the real beneficiaries.

A study of the Statute, the Order, and previous decisions of this Court indicates the fund belongs to producers. To be sure, producers do not ordinarily receive payments from the fund, but that does not indicate, or even tend to indicate, that they are not the actual beneficiaries.

First of all the fund is created by the sale of petitioners' and other producers' milk, the product of their labor and capital. The monies paid into the fund are monies paid for goods sold and delivered by producers. Handlers pay dollars to the market administrator which they owe "to producers". If this were not perfectly obvious in any event, the Statute and Order make it doubly clear. The Statute provides that orders may establish minimum class prices for milk which "all handlers shall pay . . . for milk purchased from *producers or associations of producers.*" (Emphasis supplied) To that end, Order No. 4 provides (Sec. 904.4) that, "Each handler shall pay *producers*, in the manner set forth in Sec. 904.8" prices not less than the minimum class prices. (Emphasis supplied) Section 904.8 provides for payment to the market administrator of the excess of the minimum class

prices over the uniform price established pursuant to the Order, but the Order itself describes these payments as payments "To producers, through the market administrator". Even when the handler whose class price is less than the uniform price receives payments from the market administrator, the Order still describes them as constituting payments "To producers through the market administrator".

The final provision of Order No. 4 indicates that producers may have property rights in the producer settlement fund. Section 904.11(d) provides that upon suspension or termination of the Order, "any funds collected pursuant to the provisions hereof, over and above funds necessary to meet outstanding obligations and the expenses . . . , shall be distributed to the contributing handlers and producers in an equitable manner". Under the terms of the Order, only in an exceptional case, would any balance in the fund, after meeting outstanding obligations, belong to handlers. What they pay into the fund is "to producers". Producers would equitably own any balance remaining by the terms of the Order itself. This same section negatives any proprietary or public interest of the government in the fund.

That producers are the equitable owners of the producer settlement fund is borne out by the decision of the District Court for the District of Massachusetts, in *United States* v. *H. P. Hood & Sons*,

Inc., 26 F. Supp. 672, 679 (D. Mass.), *affirmed* 307 U. S. 588. In that case, Article IX of Order No. 4 as amended, then in force, regulating the handling of milk in the Greater Boston Marketing Area, provided for a deduction not exceeding two cents per hundredweight to be made by the handlers from the blended price payable to producers. The amount of the deduction was required to be paid the Market Administrator to be expended by him for market information to producers and the verification of weights, sampling and testing of their milk (2 Fed. Reg. 1333). During the pendency of the litigation, under a supersedeas order of the Circuit Court of Appeals, the sums required to be paid by handlers under Article IX of Order No. 4 as amended were ordered to be paid into the registry of the District Court of Massachusetts. Because the Market Administrator did not receive this money, the Special Master, to whom the case was referred for findings of fact, found that it was impossible for the Market Administrator to provide the current service for the periods for which he had not received the charge (Master's Report, paragraph 117, Record in *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, pages 152-153). Dealing with the situation, the Judge of the United States District Court held:

"Under the supersedeas of the Circuit Court the 'marketing service fee' was ordered to be paid into the hands of the clerk of this court. Obviously the administrator has been power-

less to provide the designated service to the producers. *Under the circumstances it would seem equitable to redistribute that 'marketing service-fee' to the producers from whom it was withheld by the handlers and paid into court.* When and if an appellate court determines that the 'marketing service fee' is a proper charge, and should be paid to the marketing administrator, he will then be in a position to render the service and the charge should be exacted. The funds that are paid in the meantime, constituting this service charge, should be turned over to the marketing administrator for distribution to the producers from whom the money has been withheld." (Emphasis supplied). *H. P. Hood & Sons, Inc.* v. *United States*, 26 F. Supp. 672, 678.

The final decree of the District Court, affirmed by this Court, provided in paragraphs 7A, 7B, 7C for the distribution of the marketing service fee to producers in accordance with the Court's opinion (see Record, p. 103, in *H. P. Hood & Sons, Inc.* v. *United States*, in this Court). It is submitted that the opinion and decree constitute a recognition of the producers' equitable interest in sums deducted from the blended price.

The government admits that payments from the producer settlement fund "affect" producers, but denies that they have any interest therein substantial enough to support this suit. The government

now characterizes its operation by saying, "It is the handlers who make payments into and withdraw money from the fund, as a means of equalization, *inter sese*". This argument disregards the very terms of Order No. 4 which orders payments into the fund as payments "To producers, through the market administrator". Sec. 904.8 (b) (3). It is in striking contrast with the government's characterization of the fund in the *Rock Royal* case where the argument was made that fund was *created by producers from their money*. Then the government described the fund as "money which represents a part of the value of the milk delivered by all producers", "money which should be distributed among producers" (see page 24 *infra*). This description, the petitioners maintain, is as accurate today as it was then.

D. Since producers have an interest in the producer settlement fund, they have standing to complain of its illegal dissipation.

Since petitioners are the beneficial owners of the settlement fund, it requires no extensive citation of authority to show that they have standing to sue a government official to prevent unlawful interference with their property without statutory authority.

In *Thompson* v. *Deal*, 92 F.(2d) 478, cotton producers were held to have a standing to challenge the disbursement by the manager of the National Cotton Pool of a fund in which they had an equi-

table interest, analogous to that asserted by the petitioners here. Under regulations promulgated by the Secretary of Agriculture under the Bankhead Act, cotton growers deposited in a pool surplus exemption certificates, which were thereafter purchased by growers who did not have an allotment to cover their crop. The purchase price of the certificates was then paid into the pool. When the Bankhead Act was repealed, the defendant manager of the pool proposed to distribute the fund to the persons who deposited the certificates. The plaintiffs who had purchased certificates sought to enjoin this disbursement. The Court then described the action in these terms (p. 483):

> "Its entire purpose is to challenge the authority of certain government agents to distribute improperly, as appellants claim, a fund in which they have an interest and in which the government has none—as it is clear, we think that here the government has no proprietary or possessory rights in the fund. It is also clear that under the circumstances the court may impress an equitable lien on the money and order its return to equitable owners."

Other analogous instances of suits against government officials based upon a beneficial property right may be cited. *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470. In *Santa Fe Pacific RR* v. *Lane*, 244 U.S. 492, the beneficiary of a land grant had standing to pro-

test against an unlawful charge by the grantor government for surveying it. In *Ickes* v. *Fox*, 300 U.S. 82, beneficiaries contracting under the Reclamation Act and supplementary legislation had standing to restrain enforcement of an order purportedly issued thereunder, wrongfully limiting their water rights. These cases do not involve benefits in the sense of pure donations or gifts; neither does the instant case wherein producers must give valuable consideration by supplying milk. These petitioners merely seek their day in court to show that respondents have unlawfully compelled payment to other persons of part of the sums which by the terms of the Act and the Order themselves comprise payments to producers for milk. The decisions of the lower courts would deny them the right to attempt to show that their property is being illegally diverted to one group of producers, rather than to all producers uniformly as required by the Statute. Section 8 c (5)(B).

E. It is immaterial that the sanctions of the Act are applicable only to handlers.

It is no obstacle to the petitioners' standing to sue that the sanctions of the Act are made applicable to handlers (Sec. 8c (14)) or that the Act provides that no order shall be applicable to any producer in his capacity as producer. (Sec. 8c (13)(B)). The Act and the Order obviously affect a producer in his capacity as a vendor of his product. "To regulate the price for such transactions is to regulate

commerce itself, and not alone its antecedent conditions or its ultimate consequences. *The very act of sale is limited and governed.*" Cardozo, J. in *Carter v. Carter Coal Co.*, 298 U.S. 238, 326. Nor is the impact of sanctions a determinative criterion of standing to sue. In *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422, the Court said:

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked."

Certainly in the present case producers do not lose their standing because orders are applicable only to handlers. One must look further to see if the challenged provisions of the order affect the price paid for their milk. Their standing to complain here is no different than it would be if the Order provided that handlers should pay the minimum price to the market administrator for producers, and then or-

dered the market administrator to pay half over to producers, and to pay himself the balance or to erect a monument with it. If the minimum prices were fixed in accordance with statutory standards, it still would be true that handlers had no financial interest in what became of their payments. But no one could assert that such a diversion of the fund did not operate to affect adversely the amount paid producers for their product. It is idle to say that such extreme examples need not be considered. The petitioners' complaint here charges an illegal diversion of the fund, which, though small as to each producer, aggregates many thousands of dollars for all producers. The holding of the Court below that producers have no standing to complain, leaves them without remedy for any diversion of the fund, no matter how great it might be.

II. The Petitioners' Standing to Sue is Essentially Different from that of the Producers in *Wallace* v. *Ganley*, 95 F.(2d) 364.

The Court of Appeals considered that the allegations of the complaint which set forth that the petitioners sell their milk to handlers identified their rights as arising out of contract. Without any clear analysis of the nature of these contractual rights, the Court applied the doctrine of *Wallace* v. *Ganley*, 95 F.(2d) 364 (App. D.C.). That case held that producers who alleged that they had contracts

for prices higher than the minimum fixed by the Order and who did not allege that the threatened enforcement of the Order in any way adversely affected their contracts, had no standing to complain.

The petitioners' rights, so far as they may arise out of the contractual nature of the sale of their product, are essentially different from those of the producers in *Wallace* v. *Ganley*. The petitioners have no contracts entitling them to prices higher than the uniform price lawfully computed. In selling their milk to handlers, they have contracted with reference to the Act and the Order. The valid terms of the Order become an implied term of the arrangement by which they sell their product. *Cf. Northwestern Yeast Company* v. *Broutin*, 133 F. (2d) 628 (C.C.A. 6th). They do not bargain for a diminution of their return caused by an illegal deduction from the blended price. If the handler to whom they sell their milk had made an illegal deduction from the uniform price on his own initiative, the producers could effectually demand payment of the balance withheld. But here the handlers have actually paid the amount in question "To producers through the Market Administrator". The illegal appropriation of a portion of the price has occurred after the money has left the handlers' possession on its way to producers. And the handlers have no power to resist the expropriation since the money is in effect earmarked for

producers when it is paid to the Market Administrator. If the producers have a contractual right to receive the lawfully computed blended price, the illegal term of the Order directly interferes with that right. Under such circumstances they have standing to complain. *Truax* v. *Raich*, 239 U.S. 33, *Pierce* v. *Society of Sisters*, 268 U.S. 510, *Scully* v. *Bird*, 209 U.S. 481, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605.

It is not possible to justify the frustration of the producers' reasonable business expectation that they will receive the lawfully computed uniform price for their product by argument that they are free to bargain for a higher price. In the first place, if they have a right to the lawful blended price they do not lose it by not seeking more than the law allows them. In the second place, the freedom to bargain for higher than the lawful uniform price, under a regulation embracing market-wide equalization, is illusory. The essence of market-wide equalization is the sharing of the fluid milk outlets in the market. If producers sell their product to a handler who uses more of it for Class I purposes than the market average, that handler pays the full value of his milk at the classified prices to all producers in the area, not merely to his own producers. The amount he pays into the producer settlement fund places a definite restriction on the freedom of his own producers to obtain more than the lawful blended price. This restriction on the bargaining

power of producers is constitutional, but it is also economically very real. When the equalization provisions of the Order are infected with an illegal term, which eats into the sums paid into the pool and works a deduction from the blended price, the power of producers to bargain for higher prices for their products encounters a further obstacle and an illegal one. To remit producers to the remedy of attempting to bargain with handlers for sums of money, already paid by the handlers "to producers", and illegally diverted on the way, is to suggest a remedy utterly fanciful and unreal.

III. The Existence of Petitioner's Legal Rights Finds Support in the Agricultural Marketing Agreement Act.

In *Tennessee Power Co.* v. *T.V.A.*, 306 U.S. 118, 137-138, Mr. Justice Roberts, speaking for this Court, included a legal right "founded on a statute which confers a privilege" as one which the courts would protect from illegal action by government officials. A statute may be the basis of a property right as in *Santa Fe Pacific R.R.* v. *Lane*, 244 U.S. 492; it may be the basis of a contract right as in *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1. Or a statute may confer a privilege as in *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94.

A. The terms of the Act and Order No. 4 imply the creation of rights in producers.

In the *Magnetic Healing* case, *supra*, an order of the Postmaster General barred the appellants from receiving mail, and it was held that they had standing to complain that the order was without statutory authority. In other words, they had a statutory privilege to have their mail delivered to them, although the Court assumed that Congress has full and absolute jurisdiction over who may or may not use the mails and that such action would not be subject to court review. See 187 U.S. 94, at 107. So here, once the Secretary of Agriculture has determined the minimum prices which they are to receive, petitioners are entitled to receive that price free from illegal attempts by the respondents to pay a portion of it to some other person.

The Order adopts terms authorized by Sec. 8c(5)(A) of the statute which permits the fixing of minimum class prices *payable to producers* for their milk. Upon the adoption of such a term, producers selling in the Greater Boston Area have a right to receive those prices in full, subject only to adjustments and differentials specified in the Act. The Order also includes terms under Sec. 8c(5)(B)(ii), providing for a uniform price, to be paid to all producers by all handlers, although the total class price of milk bought by each handler may be greater or less than the total of his uniform price payments. After setting up the equalization pool which resolves the apparent inconsistency of these two provisions by creating, in effect, a market-wide

pool of milk, the contested term of the Order (Sec. 904.7(b)(5)), as a part of the computation to establish the uniform price, takes away part of the minimum class prices owed to producers as a whole. Handlers are not thereby excused from paying an equivalent amount of the minimum class price. In that event, the same Order which seemed to create the right to receive the minimum class price would have, in effect, decreased those prices below those first named in the Order. Producers would never have become legally entitled to them. On the other hand, handlers would never come under a legal duty to pay out that amount to producers. However, the present Order requires that the minimum class prices shall be paid "to producers", and under the statute producers as a whole have the legal right to receive the minimum class prices which handlers pay (Sec. 8c(5)(A)). Instead, the Order, while purportedly requiring them to be paid "To producers, through the market administrator", requires the diversion of a part of these prices to the cooperatives which are certified by the respondents without any authority of the statute. The result is an interference with and partial destruction of petitioners' right to receive the minimum class prices, a legal right conferred by the statute when the Order adopts the terms of Sec. 8c(5)(A). It is accomplished by directing disbursement of part of the money to a favored class of producers, through their ownership of the co-

operatives, in contravention of the mandate of the statute that producers shall receive a uniform price.

B. The Statute need not specifically declare the creation of private rights.

Regardless of whether or not the Statute gives producers the right to attack minimum class prices which the Secretary of Agriculture may establish, producers are the beneficiaries of a statutory privilege to receive in full the class prices which he has established, subject only to adjustments and differentials authorized by the Statute. It is immaterial that Congress has not specifically indicated an intention to give producers legal rights and has applied sanctions only to handlers. In *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, Congress had not specifically declared that anyone barred from the mails without statutory authority had a legal right to the use of the mails, and the Postmaster General's order did not compel or prohibit any action by the complainants. See also *Pike* v. *Walker*, 121 F. (2d) 37, (App. D.C.). Neither does a legislative grant of a corporate charter declare the intent to create irrevocable legal rights, but that is the law unless the legislature reserves the right to alter the corporate powers. *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

This Court has held that the Transportation Act of 1920 entitled carriers to equality of treatment in regard to joint use of terminal facilities thereby

giving a carrier standing to contest an order of the Interstate Commerce Commission permitting the acquisition of control by a competing railroad, although Congress had not expressly indicated the purpose to create private rights. *The Chicago Junction Case*, 264 U.S. 258.

This Court has held that the Railway Labor Act creates in employees private rights which may be safeguarded and enforced by the Courts, although the Act itself contains no express provisions for employees' suits to protect those rights. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 281 U.S. 548.

Under the National Labor Relations Act, private parties have no standing to apply for a decree enforcing an order of the National Labor Relations Board. The statutory method for review by a Circuit Court of Appeals is exclusive. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. Yet this Court has expressly left open the question of whether or not that Act creates such legal rights in unions or employees that they might contest illegal action of the National Labor Relations Board by independent suit. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 412. Lower federal courts have been called upon to decide the question, however, and have determined that unions do have standing to attack illegal action of the Board when

the exclusive form of review provided by the Act is not open to them. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 41 F. Supp. 57 (E.D. Mich.); *American Federation of Labor* v. *Madden*, 33 F. Supp. 943 (D. Col.); see *American Federation of Labor* v. *National Labor Relations Board*, 103 F. (2d) 933, 936 (App. D.C.) *affirmed* 308 U.S. 401; *Klein* v. *Herrick*, 41 F. Supp. 417 (S.D.N.Y.).

C. Petitioners' injury is not *damnum absque injuria.*

The respondents' position is that, however immediately and drastically petitioners may be affected by the deduction from their price or from the producer settlement fund to provide for payments to the cooperatives, their injury is, in effect, *damnum absque injuria*. However, it cannot be contended that the Order is merely an act of largesse which serves only to reinforce the producers' position *vis a vis* the handlers, by insuring them a minimum return at least equal to the blended price, but which gives them no right to insure computation of that price from the market-wide class values of milk in accordance with the Act. The statute here was not enacted in the proprietary capacity of the Federal government, designed solely to regulate the internal affairs of administration, but was enacted to regulate interstate commerce. Cases such as *Perkins* v. *Lukens Steel Co.*, 310

U.S. 113, and *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, therefore have no application to the facts presented here. The acceptance by the petitioners of benefits under the Act and Order No. 4 does not estop them in any manner from asserting the illegality of other separable portions of the Order. *Cf. Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80.

Petitioners do not here necessarily contend that Congress intended to confer upon producers standing to challenge the class prices fixed by the Order. To assert that their position is based on that premise ignores rather than meets the core of petitioners' argument. They contend only that the respondent Secretary of Agriculture, having fixed the class prices payable to producers pursuant to Sec. 8(c)(5)(A) of the statute, cannot direct that someone other than producers, or just one class of producers, shall receive part of the money. Under the terms of the statute the price is payable to *all* producers and respondents directly injure petitioners by an invasion of their legal rights when they direct otherwise.

The Act guarantees the plaintiffs, not merely that they will be paid at the blended price, but, in addition, that their return and that of other producers in the market will be "uniform", subject only to the specific differentials authorized by its terms (Sec. 8c(5)(B)). If as the complaint sets forth the cooperative payments are unauthorized,

the uniformity of returns under the Act has been destroyed, because the petitioners have been made subject to a deduction not shared by producers who are members of the cooperatives (whose members participate in co-operative assets). The petitioners, against whom this discrimination operates, have standing to protest. *Cf. The Chicago Junction Case*, 264 U.S. 258.

Regulation of the petitioners' business by the Order is admittedly within the powers of Congress; and it is now settled that in the interests of orderly marketing some producers may be forced through equalization to surrender the price advantage which they once enjoyed through favorable outlets to the fluid market. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533. Since their business is subject to regulation even though sanctions are not applied to them, producers have a right to demand that that regulation be carried out, without discrimination and in accordance with the mandate of Congress. In a word, producers are certainly entitled to have their minimum and "uniform" prices lawfully computed, if fixed at all.

Congress has not provided elsewhere for adequate protection of producers' legal rights. While producers may appear at hearings conducted by the Secretary of Agriculture, they are not parties and cannot obtain court review of the Secretary's rulings. Their only recourse is to the courts. It

would be illogical to suggest as an answer that the respondents are charged with the duty of protecting producers' interests when they stand here charged with an unauthorized invasion of producers' legal rights.

To say, as the court below did, that this suit is one in which the court is asked to interfere with the official discretion of government officers, entirely misconceives petitioners' legal rights supporting their standing to sue, as well as the case on its merits. To prevent a government officer from doing what he has no legal right to do is not an interference with his discretion. *Ex Parte Young*, 209 U.S. 123, 159. This rule applies equally to action without statutory authority as to action under an unconstitutional statute, and to federal officials as well as state. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605.

In its recent decision, *Switchmen's Union of North America* v. *National Mediation Board*, — U.S. — (decided November 22, 1943) this Court has not repudiated the settled rule that acts of an official which exceed his statutory powers may be challenged by private persons whose legally protected interests are invaded. In that case the National Mediation Board was acting within the scope of its statutory authority. This Court held that the history and language of the applicable statute indicated a Congressional design to place beyond judicial review the manner in which the

Board exercised its statutory prerogative. In the present case the petitioners complain of action by the Secretary of Agriculture beyond his statutory authority and in contravention of the statutory mandate. They rely upon the familiar principle that "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield* v. *Goldsby*, 211 U.S. 249, 262. The decisions of this Court preserve a clear distinction between a challenge to discretionary administrative action within the confines of statutory power and a challenge to administrative action which leaps over statutory bounds. *Garfield* v. *Goldsby, supra; Ness* v. *Fisher*, 223 U.S. 683; *Ickes* v. *Fox*, 300 U.S. 82; *West* v. *Standard Oil Co.*, 278 U.S. 200; *Work* v. *Louisiana*, 269 U.S. 250, 254. The plaintiffs in the *Switchmen's* case were not barred *in limine* on the ground that they had no legally protected interest at stake, as were the petitioners here in the Courts below. Relief was denied in the *Switchmen's* case on the basis that the grievance had been placed by Congress outside the field of judicial inquiry. In the present case the Act itself (Sec. 8c(15)(B)) contains express provision for judicial review of the Secretary's acts.

Petitioners' interest is not indeterminable, re-

mote or uncertain. On the contrary, the injury is direct. The extent of injury is susceptible of accurate computation. The aggregate loss to producers in the position of these petitioners since adoption of the provisions which they seek to attack averages $15,000 a month in the Boston Marketing Area alone.[1] While the loss to each producer is small in any limited period, it is definite and of considerable moment even to individual producers over a period of several years. The principle of *Massachusetts* v. *Mellon*, 262 U.S. 447 does not offer even a remote analogy, since the action of respondents here is the equivalent of a direct tax upon the sale of these petitioners' milk without legal authority. It would be a novel doctrine to assert that one who pays a tax cannot show that Congress has not authorized the illegal exaction.

IV. The Statute Contains No Prohibition, Express or Implied, Against Suit by Producers to Prevent an Unlawful Dissipation of the Producer Settlement Fund.

There are express provisions in the Act granting administrative relief to a handler, who may file a written petition with the Secretary of Agriculture

[1] The provisions challenged by the petitioners have remained in effect in all substantial particulars in the Boston Milk Order from August 1, 1941 to the present time. Various amendments to the Order since that time have not altered the substance of these provisions. (Amendment No. 1, effective October 28, 1941, 6 Fed. Reg. 5481; Amendment No. 2, effective April 3, 1942, 7 Fed. Reg. 2529; Order No. 4 as amended, effective March 15, 1943, 8 Fed. Reg. 3109, further amended June 21,

"stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom". (Sec. 8c(15) (A)). Judicial review is provided in Sec. 5c(15)(B)). This grant of administrative relief to the handler is not tantamount to the denial of judicial remedy to the producer, who seeks to vindicate his own substantive rights. Handlers are not financially interested in the producer settlement fund; producers are. There is no assurance that handlers can raise in an administrative petition the illegality of the payments to cooperative associations out of the fund. This Court has held they have no standing to raise that issue in direct litigation in the Courts because they are not "affected" by such payments in which they have no financial interest. In addition, the Second Circuit Court of Appeals has held that the Act does not accord to a handler through administrative petition and subsequent judicial review the right to contest provisions which do not "affect" him. *Queensboro Farm Products* v. *Wickard*, 137 F. (2d) 969.

1943, 8 Fed. Reg. 8294.) Payments to cooperatives out of the equalization pool through September 1943 have been as follows:

August 1941 through December 1941,	$67,165.62
January 1942 through December 1942,	$177,523.60
January 1943 through September 1943,	$150,749.21
Total (August 1941 through September 1943)	$395,438.43

The concept of a private person endowed with power to vindicate the public interest has been evolved from the decision of this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470. In that case, the Court pointed out "that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission". *Federal Communications Commission* v. *National Broadcasting Company, Inc.*, 319 U.S. 239, 247. One Federal Court has construed the *Sanders* case to mean that Congress may designate some non-official person to vindicate the public interest in proper execution of statutory authority, although such private person shows no protected private right. *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C.C.A. 2nd), *reversed* and *remanded* on other grounds — U.S. — (October 18, 1943). However, in the *Sanders* case the litigant suffered "economic injury" upon which its standing was predicated. Even so, doubt has been expressed "with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on courts to review an order of the Commission". Mr. Justice

Douglas dissenting in *Federal Communications Commission* v. *National Broadcasting Company, Inc., supra.* Whether handlers suffer "economic injury" as the result of deductions from a fund in which they have no financial interest is a problem not presented by the present record. However, if handlers have no standing to contest the payments in question through an administrative petition culminating in judicial review, the producer settlement fund can be dissipated in violation of the Statute, unless producers have a standing in Court to protect it.

The producers' standing to complain of the illegal diversion of the producer settlement fund, however, does not rest on the solution of the problem of the scope of the administrative review available to the handler. Statutory specification of one mode of relief to the handler may exclude the handler from another. This follows from a familiar rule of statutory construction. (See *Switchmen's Union of North America* v. *National Mediation Board,* — U.S. — (decided November 22, 1943), and cases there collected.) It does not follow from the same rule, or the authorities applying it, that the availability of administrative petition and judicial review to the handler shuts the doors of the Courts to producers when they seek to protect their own distinct personal rights. Producers need not wait upon the discretion of others to protect their own rights. To deny a person the

power to assert his own rights is to deprive him of property without due process of law. *Cf. Poindexter* v. *Greenhow*, 114 U.S. 270, 303.

To palliate the denial to producers of standing to challenge the dissipation of the producer settlement fund, the respondents have hitherto pointed to various evidence in the Act of Congressional solicitude for the welfare of producers. Specifically it is claimed that the Act gives producers the right to appear and be heard before the order or amendment thereto is issued. (Sec. 8c(3)). In certain circumstances, no order or amendment can become effective unless the Secretary determines two thirds of the producers favor it. (Sec. 8c(8)). The Secretary must terminate an order (Sec. 8c(16)(B)) whenever he finds that such termination is favored by a majority of producers. These provisions, alone or taken together, cannot be construed as an implied prohibition in the Statute against the present action. If they do not have that significance, they have no materiality. The contention is not made that the substantive rights of the petitioners are divested by majority or two-thirds vote, or that such a vote can authorize the insertion in an Order of a term forbidden by the Act. Indeed the provisions in the Statute (Sec. 8c(12)) by which the cooperative association votes as a unit for its members increase the necessity for judicial protection of the rights of non-members when the Order contains a term not authorized

by Statute in which the cooperatives have a direct financial interest. For as a practical matter, the officers of the cooperative association are able to vote money into their own corporate treasury when they direct that the association record itself in favor of a term in a Milk Order, which provides payments to cooperatives out of the producer settlement fund.

V. Petitioners' Injury is Not Speculative or Indeterminate.

It has been shown that the payments to cooperative associations are made out of the producer settlement fund through a reduction of the blended price (pages 16 to 18, *infra*). The complaint alleges that the deduction of $15,575.31 made in the August, 1941 delivery period to effectuate these payments decreased the blended price in said month by 1.55 cents per hundredweight. (Complaint, paragraph 12, R. p. 10). The answer of the respondent admitted this allegation but alleged that "loss to the plaintiffs cannot be shown because it is obviously impossible to determine for the purposes of comparison what the blended price would have been in the absence of such amendments" (Answer paragraph 7, R. pp. 21, 22). On this basis, the Government in the Court below and its brief opposing certiorari (pages 12, 13) ad-

vanced the argument that the petitioners' loss is speculative or indeterminate.

The short answer to this contention is that the District Court and the Court of Appeals did not and could not deal with the issue of fact which it presents: whether the payments to cooperatives had the effect of increasing the blended price to producers under the Order. The matter was set up in the respondent's answer but the Courts below considered only the first defense in that answer, to wit: "The complaint fails to state a claim against the defendant upon which relief can be granted". The complaint stated a definite and precise pecuniary injury, ascertainable with mathematical accuracy. There was no occasion for the District Court or the Court of Appeals to deal with the allegations in the answer which were not before them, and on which proof would unquestionably be called for at a trial on the merits.

Moreover, analysis shows the fallacy inherent in the argument, set forth in paragraph seven of the respondent's answer, that the petitioners' loss is speculative because cooperative payments may have increased indirectly the blended price. Payments to cooperatives out of the pool could not increase the blended price unless they increased the classified prices established by the Order. The prospect of these payments could not increase the classified prices because those prices purport to be fixed, here and now, in accordance with the

standard of the Statute (Act, Sec. 8c(18), Order No. 4 as amended. Finding 2, Sec. 904.0.) The statutory standard does not permit the Secretary, in establishing classified prices, to consider the operation *in futuro*, of a term inserted in the Order without statutory authority. If the Secretary's answer (paragraph 7, R. pp. 21, 22) means that he fixed the classified prices higher than he otherwise would, because he intended to provide for the payments to cooperative associations, then the Secretary is, in effect, asserting that the classified price structure of the Order is tainted with the illegal provision for payments to cooperative associations. The petitioners are reluctant to believe that in order to prove their injury speculative, the respondent Secretary will attempt, or be permitted to prove, that the whole price structure of the Order collapses with the challenged term. In any event, the full significance of the respondent's answer can only be proved by a trial on the merits. The petitioners attack in their complaint only the provisions of the Order permitting an illegal deduction from the blended price. They do not attack the classified prices fixed in the Order. If the classified prices are validly established the petitioners have suffered a pecuniary injury, which is not speculative or indeterminate, but definite and mathematically ascertainable.

CONCLUSION.

It is submitted that the judgment of the Court of Appeals should be reversed and the cause remanded.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF AGRICULTURE
DIVISION OF MARKETING AND MARKETING AGREEMENTS

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

(Including Amendments of the
76th Congress, 1st Session)

UNITED STATES
GOVERNMENT PRINTING OFFICE
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PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session, 7 U. S. C. A. 674, 50 Stat. 249), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935" Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes. References to recent amendments to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes.

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED[1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency):

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy):

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such

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[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

orderly marketing conditions for agricultural commodities in interstate commerce as will establish[3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909, to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to deter-

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[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

mine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the terminations of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores *and the products of honeybees*),[3] or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Ore-*

[3] The words "and the products of honeybees" were inserted by public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

gon, and Idaho,[6] and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops,[7] honeybees,[8] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the

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[6] The words ", other than apples produced in the States of Washington, Oregon, and Idaho," were added by Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.

[7] The word ", hops," was inserted by and the following provision was contained in Public No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938:

"SEC. 3. No order issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops except during the two crop years next succeeding the date of enactment of this Act."

The provision quoted was amended by Public, No. 91, 76th Congress, Chapter 159, 1st session, approved May 26, 1939, to read as follows:

"SEC. 3. No orders issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops after September 1, 1942."

[8] The word "honeybees," was inserted by Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

case of orders covering milk products only, such provision is approved or favored by at least three-fourth of the producers who, during a representative period determined by the Secretry of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[9] of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making

[9] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Oregon, and Idaho*,[10] and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, *hops*,[11] *honeybees*,[12] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [13] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [14] such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets

[10] Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.
[11] Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938.
[12] Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.
[13] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.
[14] The italicized words were substituted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus; and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating

to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional pro-

duction areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have,

during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[15]

[15] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[16]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a num-

[16] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement act of 1937.

ber of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[17] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority

[17] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[18] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam: except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[19]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any

[18] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[19] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes

Territory, the District of Columbia, possession of the United States, and foreign nations.[20]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[21] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and book of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22 (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend

[20] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[21] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision therof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[22]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [23]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[22] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title," wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment" whenever they appeared, and inserting in lieu thereof the word "any."

[23] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in the footnotes.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

CITATIONS

550307—43

In the Supreme Court of the United States

OCTOBER TERM 1943

No. 211

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS AND F. WALSH, PETITIONERS

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 67–71) is not yet reported.

JURISDICTION

The judgment of the court below was entered on June 14, 1943 (R. 72). The petition for a writ of certiorari was filed on July 29, 1943. The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

QUESTION PRESENTED

Whether milk producers have standing to maintain an action to enjoin the Secretary of Agriculture from carrying out provisions of a milk order which they allege are unauthorized under the Agricultural Marketing Agreement Act of 1937 and claim have the effect of reducing the minimum prices to which they are entitled under the Act.

STATUTE AND MILK ORDER INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 672), as further amended August 24, 1935 (49 Stat. 750), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. Sec. 601 *et seq.*). An annotated compilation of the Act is contained in the record (R. 31–49). The Order involved is Order No. 4, regulating the handling of milk in the Greater Boston Marketing Area, as amended July 28, 1941, effective August 1, 1941, issued by the Secretary of Agriculture (7 C. F. R., Chap. IX, Sec. 904; 6 Fed. Reg. 3762). A copy of the Order as amended is set forth in the record (R. 51–65).

STATEMENT

On September 22, 1941, petitioners, each suing in his capacity as a milk producer, filed a complaint

in the District Court for the District of Columbia seeking to enjoin respondent from certifying the qualification of any cooperative association of producers to receive payments under Section 904.9 of the Order, and praying that the court declare Sections 904.9 (a) to (d) and 904.7 (b) (5) of the Order illegal and void (R. 6–13, 5). Respondent answered alleging as his first defense that the complaint failed to state a claim upon which relief could be granted and praying that the complaint be dismissed (R. 20–23). On the application of petitioners the case came on for preliminary hearing on the first defense. The District Court sustained the defense and dismissed the complaint (R. 24) on the ground that petitioners had no standing to sue (R. 26–27). The Court of Appeals affirmed on the same ground (R. 72, 67–71).

The Order.—The relevant provisions of the Order may be summarized as follows:

Section 904.4 establishes minimum prices to be paid by handlers to producers according to the use to which the milk is put (R. 54–56). Section 904.7 prescribes the method by which the Market Administrator shall compute, for each delivery period, the value of the milk sold or used by each handler, and the uniform blended price to be paid to producers (R. 58–59). To obtain the value of milk sold or used by each handler, the Market Administrator is to multiply the quantity of milk sold or used by him in each class by the price applicable

to that class under Section 904.4, and add the totals. The uniform price to be paid producers is to be determined by adding together the value of all milk sold or used by all handlers in the area, making certain adjustments and deductions, and dividing the result by the total quantity of milk handled in the area.

One of the deductions permitted in determining the uniform price to producers (Section 904.7 (b) (5)) is for payments made to cooperatives pursuant to Section 904.9 (R. 62–64). That Section provides that any cooperative association which the Secretary of Agriculture decides meets the stated qualifications shall be entitled to receive specified payments from the Market Administrator on milk received from its members. In order that a cooperative qualify for such payments, the Secretary must find it, *inter alia* (R. 62–63)—

> * * * to be systematically checking the weights and tests of milk delivered by its members to plants other than those which may be operated by itself; to guarantee payments to its producers; to be maintaining, either individually or in collaboration with other qualified cooperative associations, a competent staff for dealing with marketing problems and providing information to its members with whom close working relationships are constantly maintained; to be collaborating with other similar associations in activities incident to the maintenance and strengthening of collective bar-

> gaining by producers and the operation of a plan of uniform pricing of milk to handlers; * * *

The Secretary characterizes these payments as made to cooperatives "performing certain marketing services" (R. 52). It is this deduction of which petitioners complain.

Section 904.8 (b) (1) requires all handlers to pay producers not less than the uniform price computed pursuant to Section 904.7 (R. 60). However, the value of milk sold or used by each handler may well vary from the uniform price required to be paid to producers, since the handler's value is based on the uses to which the milk handled by him is put, while the uniform price of milk is based on the uses to which the milk of all handlers in the area is put. To adjust this variation Section 904.8 (b) (3) establishes what is commonly known as the producer-settlement or equalization fund in the hands of the Market Administrator (R. 60). Each handler is required to pay to, or receive from, this fund the amount by which his payments to producers as required by the Order are less than, or exceed, the value of the milk handled by him. The payments made to qualified cooperative associations by the Market Administrator under Section 904.9 come from this fund.

The complaint.—The material allegations of the complaint are as follows (R. 6–13): Petitioners produce and sell milk to handlers who resell in

the Greater Boston Marketing Area as defined in the Order. They bring this suit for themselves and for the benefit of all others similarly situated.

Petitioners, as well as all other producers whose milk is marketed pursuant to the Order, are paid the uniform price as computed under Section 904.7. On September 12, 1941, the Market Administrator announced the uniform price applicable to the preceding delivery period. This announcement discloses that, in computing the uniform price by dividing the use value of all the milk by the total number of pounds, $15,575.31 was deducted (from the total value of over $2,500,000 (R. 19)) for payments made to qualified cooperative associations. Similar deductions will be made for future delivery periods, and additional deductions will be made as more cooperative associations become qualified. This will result in a lower blended price to producers causing annual losses to the individual petitioners ranging from $10.50 to more than $39.00 and collectively to petitioners and over 6,000 others similarly situated of more than $60,000 per year.

Petitioners claim that Sections 904.9 (a) to (d) and 904.7 (b) (5) of the Order are not authorized by the Act and are illegal and void.

ARGUMENT

Although petitioners also seek to argue the merits of their case, the courts below decided only that they had no standing to sue. Since this is the only question on which they can rely in seeking

certiorari, it seems unnecessary to discuss the merits of the case here.

We think it clear that both courts below correctly decided that the petitioners had no standing to sue. One can challenge the validity of an act or order in a suit against a governmental agent only where the conduct of the official invades a legal right—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137–138. In their petition for certiorari petitioners claim that the act of the Secretary invades both contract and property rights. They disclaim (pp. 8–9) any right founded on a statutory privilege, contending that the Court of Appeals' view that this was their argument was a misconception.

Petitioners assert that the Secretary has interfered with the performance of contracts for the purchase and sale of milk by preventing handlers from paying the "full" price to producers (Pet. 8–12). The complaint does not allege, however, that petitioners had contracts under which they were to receive more than they were actually paid. Furthermore, the Order does not prevent petitioners from making or performing contracts which will give them more than the uniform prices; only minimum prices are established (R. 54–55).

Petitioners also contend that in making deductions for payments to cooperatives the Market Ad-

ministrator has improperly taken into his possession through the producer-settlement fund money which rightfully belongs to them, that they have an equitable interest in this money, and that this suit is therefore brought to vindicate a property right (Pet. 12–14). Petitioners, however, have no legal or equitable interest in the money in this fund. They receive payment for their milk from the handlers, not from the fund, at not less than the uniform price. They put nothing into the fund and they are entitled to take nothing out. It is the handlers who make payments into and withdraw money from the fund, as a means of equalizing, *inter sese*, the amounts which they pay in accordance with the use to which the milk purchased by each handler is put. The deductions for payments to cooperatives can affect petitioners only because they are taken into account in the computations upon which the uniform prices are based. Although the cooperatives are paid from the settlement fund, the producers do not receive their uniform price from that fund, and, accordingly, have no property interest in it.[1]

[1] It is true that this Court held in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 561, that the handlers have no sufficient interest in the fund to give them standing to complain concerning the payments to cooperatives. It does not follow, however, that this gives the producers a right to complain. Cf. *Dayton-Goose Creek Ry* v. *United States*, 263 U. S. 456, 484. Their claim to a property right in the fund has even less basis than that of the handlers.

Nor does the Order deprive petitioners of any other property right. It does not take away or affect their right in the milk which they produce. It does not reduce or fix the price at which they may sell. Its purpose and effect is to benefit producers, as well as the public generally, by guaranteeing the producers a minimum price for their milk.

Although petitioners now expressly disclaim any such contention,* the court of appeals assumed that the only possible basis for their claim of standing to sue could be a right "founded on a statute which confers a privilege" (R. 69). Although the minimum price provisions were intended to benefit producers, it seems clear that Congress was not intending to confer upon producers standing to challenge the prices fixed if not high enough. In the first place, the act and the Order do not require producers to do or refrain from doing anything.

* Petitioners state (Pet., p. 8):

"* * * the court thereafter misconceived of the petitioners' 'rights to receive the minimum prices' in their contracts with handlers without unlawful interference by the Secretary, and of petitioners' claim to 'standing to protect their own property' interest as equitable owners of the Producer Settlement Fund, as 'assuming a right "founded on a statute which confers a privilege"'".

(Pet. p. 9): "Obviously, the petitioners' 'rights to receive the minimum prices' under their contracts should not be deemed as 'founded on a statute which confers a privilege' * * *".

Section 8c (13) (B) of the Act provides expressly that "No order * * * shall be applicable to any producer in his capacity as a producer." Thus the fixing of minimum prices cannot injure the producer.[3]

That Congress did not intend to vest in the producer any legal right to attack the prices established is further indicated by the administrative machinery created under which handlers, and handlers alone, are permitted to attack the validity of the Secretary's orders, both administratively and in the courts by way of judicial review. (Section 8c (15) (R. 41)). The granting of this right to handlers without giving any such right to producers manifests the intention of Congress to confer a benefit upon producers in the form of minimum prices without giving them the right to challenge the action of the Secretary on the ground that the benefits given by him were not all that the statute intended.

Congress has provided other means for the protection of the producers' interests. Producers

[3] The case thus differs from *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2), certiorari granted, No. 61, since the consumer-purchasers there involved, even though not subject to the sanctions of the Coal Act, suffered a financial loss from the establishment of minimum prices. Furthermore, that case held that the consumers' standing to sue was based upon the express language of the review provisions of the Coal Act. A motion to reverse on grounds of mootness is now pending in the *Associated Industries* case.

may appear at the public hearings which the Secretary must hold before issuing or amending an order (Section 8c (3) (R. 34)). No order can be issued without approval by two-thirds of the producers (Section 8c (8) (9) (R. 38–39)). The Secretary must terminate the order when he finds that the majority of the producers favor termination (Section 8c (16) (B) (R. 41–42)). These provisions, for general producer approval of a program, may be contrasted with those permitting all affected handlers to challenge the order both before the Secretary and in court.

Petitioners contend (Pet. 7, 14) that they are affected by the action complained of in that the deductions may result in lower uniform prices to the producers. See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 560–561. However, "it is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479. Here there has been no invasion of recognized legal rights; and there is no legislation recognizing

the alleged damage to producers as a source of legal rights.

Furthermore, we believe that petitioners' complaint shows that their interest in this matter is shared with so many others, is so indeterminable, and is so remote and uncertain that it affords no basis for the exercise of the powers of a court of equity. Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447, 487–489. Petitioners' assertion that the payments to cooperatives will result in loss to them is based on the assumption that all other factors considered in the computation of the uniform price would be the same if no such payments were made. This assumption is unjustified. The payments to cooperatives, which the Secretary has found effectuate the declared policy of the Act, are made for services performed by them which benefit all producers in the area and not merely members of the cooperatives.[4] The complaint contains no

[4] The services for which deductions are allowed are described in the legislative history of a bill containing a clarifying amendment on this point. S. 3426, 76th Cong., 3d Sess., Section 4 (referred to at p. 15 of the petition). This amendment was described in the Senate Committee Report (No. 1719, 76th Cong., 3d Sess., p. 8) as covering services "which are identifiable as benefiting all producers with a reasonable degree of equality as distinguished from services, the benefits of which are limited primarily to members of a particular cooperative association." See to the same effect, Hearings, Subcommittee of Senate Committee on Agriculture and Forestry on S. 3426, 76th Cong., 3d Sess., pp. 52–53, 75. The

allegations indicating that the producers as a whole do not obtain a higher uniform price as a result of such marketing services. A simple mathematical calculation will show that on the basis of the actual figures for the month of August 1941 (R. 19), if the payments to cooperatives induced marketing activities which raised the valuation of the total milk sold in the market by no more than six-tenths of one percent, the uniform price would have been higher than it would have been without such payments. Thus on the allegations of the complaint the injury to petitioners is so speculative and uncertain as not to warrant the intervention of a court of equity.

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services are described in 86 Cong. Rec. 12258–12259. The Senate report and the explanation to Congress (*ibid.*) shows that the object of the amendment proposed was to "establish more explicit standards," thus avoiding the question of delegation of power, to guide the Secretary in making payments which he was already authorized to make under his general power to prescribe minimum prices and the manner of paying producers. S. 3426, which contained a large number of other amendments, passed the Senate (86 Cong. Rec. 12266), but died in the House committee; although other amendments had been vigorously opposed before the Senate Committee, this particular amendment had met with no objection (86 Cong. Rec. 12256). In view of the fact that this amendment was designed to clarify and not to change the law, the failure of the House to pass S. 3426 does not manifest a congressional understanding that such payments to cooperatives were not permissible under the law as it previously stood.

CONCLUSION

The decision of the court below is correct and is in accord with the rulings of this Court. Likewise it is consistent with other decisions in the lower federal courts.[5] It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] *Wallace* v. *Ganley*, 95 F. 2d 364 (App. D. C. 1938); *Massachusetts Farmers D. Committee* v. *United States*, 26 F. Supp. 941 (D. Mass. 1939).

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